IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.486 OF 2005

Shishir B.Desai & Anr. ..Petitioners.

V/s.

Ceat Financial Services Ltd. & Anr. ..Respondents.

Mr.S.V.Marwadi & Sunita Sharma for petitioners.

Mr.D'lima for Respondent No.1.

Mr.V.B.Konde-deshmukh, APP for State.

CORAM: A.M.KHANWILKAR,J

DATE : NOVEMBER 19, 2005.

P.C. :

1. Not on board. Upon mentioning taken on board. By consent heard alongwith the Writ Petitions which are already notified today.

2. Heard counsel for the parties.

3. Rule. As short question is raised, rule made returnable forthwith by consent.

4. Mr. D'Lima waives notice for respondent No.1 and Mr. Nikam, APP waives notice for respondent-State.

5. By this petition, it is prayed that Criminal Case No.2814/S/2002 filed against the petitioners/accused No.4 and 6 pending on the file of 4th Court at Girgaon, Mumbai be quashed. It is not in dispute that petitioners are Directors of the Accused No.1 company. However, the petitioner No.1 is a Solicitor and Petitioner No.2 Chartered Accountant by profession. It is their case that they have no concern with the day to day affairs of the company. It is not in dispute that petitioners are not signatories to the cheques. Relying on the recent decision of the Apex Court in the case of **S.M.S.Pharmaceuticals Ltd. V/s.Neeta Bhalla and Anr.. reported in 2005 SCCL.COM 579 and** decision of our High Court **in Vijay Mallya V/s. State of Maharashtra & Anr. in Criminal Application No.4827 of 2004,** decided on December 23, 2004, counsel for the petitioners contends that the criminal action instituted against the petitioners who have been named as Accused No.4 and 6 respectively will have to be quashed in so far as the petitioners are concerned. This is so because, the only assertion made in the petition so as to indicate complicity of the petitioners can be discerned from paragraph-2 of the complaint, which reads thus:

> "2. Accused No.1 is a company duly incorporated under the Companies Act, 1956. Accused Nos. 2 to 6 are the Directors and/or person, who are in charge and control of the day to day affairs and management of Accused No.1. Accused Nos.2 to 6 are otherwise also being the Directors, responsible for the affairs of Accused No.1."

There is no other allegation in the complaint and the allegation referred to above are too general and vague, so as to proceed against the petitioners for the alleged offence of dishonour of cheques.

6. Counsel for the respondent No.1 complainant however, contends that there is clear assertion made in the complaint in paragraph-5 and 6 which read thus:

> 5. Accused No.6 forwarded his letter dated 3rd February, 2001, putting forward various unsustainable and untenable contentions. The Complainant forwarded its Advocates letter dated 14th March, 2001, dealing with the contents of the said letter of Accused No.6. The Complainant craves

leave to refer to and rely upon the said letter and the postal records in connection with the same. The Complainant states that each of the Accused have thus failed and neglected to comply with the requisitions of the said Notice.

6. The complainant submits that in view of what is stated in the foregoing paragraphs and the default by the Accused in making payment within the stipulated period, the Accused have committed offence punishable under section 138 of the Negotiable Instrument Act, 1881.

7. Having considered rival submissions and perusing the complaint as filed, I have no hesitation in taking the view that the allegation made in the complaint as against the present petitioners/accused No.4 and 6 is concerned, is not sufficient to proceed against the petitioners in law. The legal position has been now reiterated by the Apex Court in the recent decision in the case of **S.M.S.Pharmaceuticals Ltd.(Supra).** Something more is required to be alleged, so as to indicate complicity of directors of the company to proceed for offence under section 138

read with 141 and 142 of the Negotiable Instrument Act. The argument that the petitioners/accused No.4 and 6 did not exercise due diligence to prevent commission of offence, as is stated in paragraph-5 and 6, also does not commend to me. In the first place, the assertion is too general. In any case, in so far as offence committed by a company, only person who at the time the offence was committed, "was incharge of, and was responsible to, the company for the conduct of the business of the company", is deemed to be guilty of the offence. A priori, merely because the person happens to be one of the director of the Company or that he failed to send reply to the statutory notice or for that matter failed to prevent commission of the offence inspite of the notice will be of no avail.

8. Be that as it may, for the legal position stated by the Apex court and this court in the above said decisions, this petition ought to succeed. Accordingly, rule is made absolute.

9. It is made clear that it will be open to the trial court to proceed against the remaining accused No.1 to 3,5 and 7 in accordance with the law.